STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2007
v	No. 268528 Jackson Circuit Court
JEFFREY JAMES MILLS, Defendant-Appellant.	LC No. 05-001134-FH

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a), and was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 71 to 270 months' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The victims, ages seven and nine, are the daughters of defendant's former girlfriend. Defendant was convicted of touching their vaginas while they slept. During an investigation by the Jackson Police Department, defendant submitted to an interview and admitted to touching the girls.

On appeal, defendant first asserts that he received ineffective assistance of counsel because his trial attorney failed to move to suppress his confession.

Because defendant failed to move for an evidentiary hearing or a new trial based on ineffective assistance of counsel, we must limit our review to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). In order to establish ineffective assistance, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Whether a statement is voluntary presents a question of law for the court's determination. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994), citing *People v Walker (On*

Rehearing), 374 Mich 331, 338; 132 NW2d 87 (1965). When evaluating the admissibility of a particular statement, the court must examine the totality of the circumstances surrounding the making of the statement to determine if it was freely and voluntarily made in light of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). These factors are:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Sexton, supra* at 753.]

The absence or presence of any one of these factors is not conclusive. *Sexton*, *supra* at 753. Rather, the "ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

In the instant case, the record shows that, at the time of his confession, defendant was thirty-four years old and had some experience with the police in that he had previously been convicted of fourth-degree criminal sexual conduct. On the day of the interview, defendant voluntarily went to the Jackson Police station to speak with a detective. His interview lasted approximately one hour and twenty minutes. At the outset, the detective repeatedly told defendant he was free to leave at any time and defendant acknowledged that he understood. Defendant was not threatened, abused, or denied food, sleep, or medical attention. The only factor cited by defendant that weighs against the voluntariness of his confession is that the interview took place in a small room and defendant asserts that he suffers from claustrophobia.

Based on the totality of the circumstances, we find that the trial court would not have granted a motion to suppress defendant's confession on the ground that the statement was not voluntary. An attorney need not "make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). Consequently, defense counsel's failure to move to suppress the confession did not affect the outcome of the trial. Defendant has not shown that he was denied the effective assistance of counsel.

Additionally, defendant asserts that he received ineffective assistance because defense counsel failed to object to the trial court's scoring of offense variables four (OV-4)[1] and thirteen (OV-13).[2] Specifically, defendant argues that, because the trial court relied on facts not found by

[1] OV-4 concerns psychological injury to a victim. MCL 777.34.

[2] OV-13 concerns whether the offender engaged in a continuing pattern of criminal behavior. MCL 777.43.

the jury, his sentences are invalid under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

Defendant's argument is without merit. In *Blakely*, *supra* at 2537, the United States Supreme Court stated that a statutory maximum

> is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' . . . and the judge exceeds his proper authority. [Citations omitted; emphasis in original.]

But in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court noted that *Blakely* concerned the state of Washington's determinate sentencing scheme under which a trial court could increase a maximum sentence on the basis of judicial fact-finding. In contrast, Michigan "has an indeterminate sentencing system" in which the maximum sentence is set by law rather than being determined by the trial court. *Id.*, citing MCL 769.8. The Court further noted that the majority in *Blakely* specifically stated that its holding does not apply to such indeterminate sentencing schemes. *Id.*, citing *Blakely*, *supra*, at 2540.

Our Supreme Court recently reexamined the issue in greater detail in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). The defendant argued that Michigan's indeterminate sentencing scheme, because it allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a preponderance of the evidence, violates the Sixth Amendment of the United States Constitution as explained in *Blakely*. *Id.* at 142-143. Like defendant in the instant case, the defendant in *Drohan* asserted that the "maximum-minimum" under the guidelines constitutes the "statutory maximum" for *Blakely* purposes. *Id.* at 162. In rejecting these arguments and reaffirming its decision in *Claypool*, the Court held:

> Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). In other words, every defendant, as here, who commits third-degree criminal sexual conduct knows that he or she is risking 15 years in prison, assuming that he or she is not an habitual offender. MCL 750.520d(2). As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. [*Id.* at 164.]

Thus the trial court's reliance on facts not found by the jury when scoring OV-4 and OV-13 did not violate defendant's rights under the Sixth Amendment. *Claypool*, *supra* at 730 n 14; *Drohan*, *supra* at 164. Clearly, the trial court would have properly rejected any objection to the scores based on these rights. Because counsel need not make futile objections, counsel's failure to object on these grounds did not constitute ineffective assistance. *Goodin*, *supra* at 433.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray